HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.1164 of 2002

APPELLANT (In Jail) — Basantram alias Hariram, son of Laxmanram, aged 22 years, Caste Bansod, Occupation- Labour, Village Puta, P.S. Udaipur, District Sarguja, presently at Luchri, Ambikapur (C.G.)

Versus

RESPONDENT — State of Chhattisgarh, Through P.S. Bageecha, District Jashpur (C.G.)

(Appeal under Section 374 (2) of Cr.P.C.)

Appearance:

Mr. K.K. Singh, counsel for the appellant.
Mr. Arun Sao, Govt. Advocate for the State.

ORAL JUDGMENT
(16.05.2007)

Sunil Kumar Sinha, J.

This appeal is directed against the judgment of conviction and order of sentence dated 17th September, 2002 passed in Sessions Trial No.111/2002 by the 2nd Additional Sessions Judge, (Fast Track Court) Jashpurnagar, whereby, the said Court after holding the appellant guilty of offence punishable under Section 376 of the Indian Penal Code, sentenced him to undergo R.I. for 10 years and to pay a fine of Rs.500/-, in default of payment of fine to further undergo S.I. for 5 months.

The allegations are that on 21.1.2002 this appellant had gone to Village Sardih, which is his in-laws place, and at about 9.00 p.m. when the prosecutrix namely Munni Bai (PW-4), had gone out of her house to answer the call of nature, the appellant caught hold of her

and dragged her to an open field at a distance of about 100 meters and there, after undressing her, committed forceful sexual intercourse against her. When the prosecutrix was left, she anyhow returned back to her house and narrated the story to her maternal grandmother and other family members. On the fateful day, Rungi Bai (PW-5) & Thuova (PW-6), mother & father of the prosecutrix were not in the house, as they had gone for earning their livelihood in different village. On the next day when father & mother of prosecutrix returned to the village, story was narrated to them and ultimately on 23.1.2002 at about 1800 hrs, First Information Report (Ex.P-7) was lodged by the prosecutrix in the concerned police station.

During the course of investigation, the prosecutrix was sent for medical examination to Community Health Centre, Bageecha, where she was examined by Dr. (Smt.) Vinodini Bakhla (PW-11), who prepared her report Ex.P-19. She was also sent for ossification test and the Radiologist, after taking X-ray of her joint bones, submitted the report dated 13.4.2002, according to which, she was found in between 14-17 years. For the purpose of age, mark sheet of *Prathmik Praman-Patra Pariksha, 1999* (Ex.P-12) was also seized by the prosecution, according to which she would be aged about 14 years 10 months & 14 days on the date of incident. After usual investigation, charge sheet was filed against the appellant.

The conviction of the appellant is based upon the testimony of the prosecutrix (PW-4), which was held to be supported by the medical evidence of Dr. (Smt.) Vinodini Bakhla (PW-11).

Learned counsel for the appellant argues that the prosecution has failed to prove that on the date of incident age of the prosecutrix was below 16 years. He also argues that the

testimony of prosecutrix is not worth reliance and therefore, the conviction cannot be based on the said testimony. Alternatively, he also argues that sentence awarded to the appellant is too harsh in the facts and circumstances and even if the appellant is held guilty of the offence punishable under Section 376 of the I.P.C., then his sentence should be reduced to minimum, preferably, the sentence which the appellant has already undergone as on date i.e. 5 years & 3 months.

On the other hand, learned State counsel, opposing these arguments, supported the judgment of conviction and order of sentence passed by the trial court.

I have heard learned counsel for the parties and also perused the record.

So far as the age of prosecutrix is concerned, PW-6, Thurva (father of prosecutrix), has deposes nothing about her age in his examination-in-chief. However, he has stated only one line in his cross-examination that age of her daughter may be 14 years. PW-5, Rungi Bai (mother of prosecutrix) has also not stated anything about the age of the prosecutrix. The other evidence pertaining to age of the prosecutrix is the school certificate (Ex.P-12), which has not been proved by the prosecution in accordance with law.

So far as the ossification test report is concerned, it has been mentioned in the said report that the prosecutrix was in between 14-17 years. According to the medical jurisprudence, Radiologist's report containing particular age of a person is not a conclusive proof, as in Modi's Jurisprudence (20th Edition), it is stated that too much reliance should not be placed on the table showing the age and years of the appearance and fusion of some of the epiphysis as observed by different authors as it merely

indicates the average and is likely to vary in individual case even of the same province owing to the eccentricities of development. It is further stated that recent work has shown that the range of error may be up to three years on either side.

Therefore, in the light of above evidence it is apparent that the prosecution could not prove in this case that the prosecutrix was below 16 years of age on the date of incident and finding of the trial court recorded vide Paragraph 24 of the judgment that she was aged 14 years does not appear to be correct.

So far as the commission of crime is concerned, the prosecutrix (PW-4) deposes that at about 8.00 p.m. on the fateful day, when she came out from her house to answer the call of nature, the appellant, who had come to his in-laws' house in the village, came over there, caught hold of her, dragged her to a distant place where, he undressed her and after throwing her on the ground, committed forceful sexual intercourse against her. Due to the said act committed by the appellant, blood started oozing out of her private part. She anyhow returned back to her house and ultimately fell down unconscious in the courtyard of the house. When she regained consciousness, she narrated the story to her maternal grandmother, maternal grandfather and also to other villagers. On that day, her father & mother were not in the house and when they returned back in the next day morning, she narrated the story to them. It is thereafter, they went to the police station and lodged the report Ex.P-7, which bears her signature at 'A to A' part.

The said evidence of the victim is supported by the evidence of PW-5 Rungi Bai (mother of prosecutrix), who deposes that when she returned back to her house in the next day morning, the story

was disclosed to her by her daughter Munni and Tibna, Himna, Bhurju, Bhagwat & Rijho Bai (all villagers) and thereafter, they had gone to the police station. PW-6 Thurva (father of prosecutrix) has also stated that when he returned in the next day morning, her daughter Munni (PW-4) narrated him that the appellant had dragged her to some distance from her house and there committed forceful sexual intercourse against her. He has also added the names of various villagers as Bhurju, Dhalgu, Jattu. He has also supported the fact that the prosecutrix was taken to the police where she lodged the report.

The defence has not been able to assail the above evidence of the prosecutrix and her parents, as except few minor discrepancies nothing has been brought on the record against the evidence of these persons, particularly, against the evidence of the prosecutrix. Moreover, this evidence of the prosecutrix is supported by the evidence of Dr. (Smt.) Vinodini Bakhla (PW-11). She has proved her report Ex.P-19. She has noticed that the vulva of prosecutrix was congested and stained with blood, vagina was hardly admitting one finger, blood was oozing from lower portion of vagina, hymen membrane was recently ruptured on lower side and blood used to come on touch.

In the light of above evidence of the prosecutrix, her parents and further in the light of evidence of lady doctor (PW-11), who found recent injuries on the private part of the prosecutrix, it is established that, in fact, the prosecutrix was subjected to forceful sexual intercourse and finding recorded by the trial court in this regard appears to be correct and appellant has rightly been held guilty of the offence punishable under Section 376 of the IPC.

So far as the quantum of sentence is concerned, admittedly, it must be based upon the "Doctrine of just desert". The doctrine is the foundation of a criminal sentence which is ultimately awarded for a punishment to the wrong doer. What one really deserves should be the punishment for having committed a crime is the underlying principle. The punishment must not be disproportionately great is a corollary of "*just desert*" which is governed by the same principle which says that there cannot be a punishment without guilt and the basic element behind the principle is the proportion between crime and punishment. The lesser is the gravity of the crime, the smaller would be the punishment and the greater is the gravity of the crime, the higher would be the punishment, subject to the ancillary factors for determining the proportion of the same, though all further subject to the statutory obligations specifically provided by law in force.

In the present case, the prosecutrix is not proved to be below 16 years of age and the appellant is also aged about 22 years and therefore, looking to the facts and circumstances of this case, ends of justice would be served if the appellant is awarded punishment of 7 years and fine of Rs.500/-, in place of R.I. for 10 years and fine, as has been awarded by the Sessions Court.

Accordingly, the appeal is partly allowed. The conviction of the appellant under Section 376 of the I.P.C. is confirmed. However, the sentence imposed upon the appellant is reduced from 10 years to 7 years under Section 376 of the I.P.C. The fine amount of Rs.500/- shall be paid by the appellant, failing which he has to further undergo S.I. for 5 months. The appeal is allowed to the extent indicated above.

Sd/-
Sunil Kumar Sinha
Judge

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